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JUN 10 1963
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

WILLIS SHAW FROZEN EXPRESS, INC.,
Appellant,

v.

UNITED STATES OF AMERICA and the
INTERSTATE COMMERCE COMMISSION,
Appellees.

On Appeal from the United States District Court for the Western District of Arkansas.

JURISDICTIONAL STATEMENT.

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Appellant,

v.

UNITED STATES OF AMERICA and the
INTERSTATE COMMERCE COMMISSION,
Appellees.

On Appeal from the United States District Court for the Western District of Arkansas.

JURISDICTIONAL STATEMENT.

Appellant appeals from the judgment of the United States District Court for the Western District of Arkansas, entered February 11, 1963, dismissing a Complaint

seeking to set aside orders of the Interstate Commerce Commission. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINIONS BELOW.

The District Court for the Western District of Arkansas filed no opinion in rendering judgment below. The judgment of the District Court dismissing the Complaint, and its order denying Appellant's motion for rehearing or reargument, are not reported. They are presented in Appendix A, hereto, *infra*, p. 25. The opinion of the Interstate Commerce Commission, reported at 89 M. C. C. 377, and its unreported order denying reconsideration, are printed in Appendix B hereto, *infra*, p. 28. That opinion modified an Examiner's Recommended Report and Order, not reported, which is printed in Appendix C, hereto, *infra*, p. 44.

JURISDICTION.

This suit was brought in the District Court under 28 U. S. C., §§ 1336, and 2321-2325, to set aside orders of the Interstate Commerce Commission. The judgment of the District Court dismissing the complaint was entered on February 11, 1963. The Order of the District Court denying rehearing or reargument was entered March 8, 1963, and notice of appeal was filed in that Court on April 11, 1963. The jurisdiction of the Supreme Court to review the judgment below by direct appeal rests upon 28 U. S. C., §§ 1253 and 2101 (b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: **United States et al. v. Carolina Freight Carriers Corporation**, 315 U. S. 475; **Howard**

Hall Company, Inc., v. United States et al., 315 U. S. 495; and **Barrett Line, Inc., v. United States et al.**, 326 U. S. 179.

QUESTIONS PRESENTED.

1. Does the "grandfather" clause of Section 7 (c) of the Transportation Act of 1958 require the Interstate Commerce Commission to grant to affected carriers the right to conduct future regulated motor carrier operations on a substantial parity with the scope of prior unregulated operations?

2. If so, may the Commission validly atomize a "grandfather" applicant's business in the transportation of the entire class of previously unregulated frozen foods, throughout broad origin and destination territories

a) by fragmentation of the commodity authority granted through restricting future operations to transportation of frozen fruits only, between specified points or areas, of frozen vegetables only, between other specified points and areas, and of frozen berries only, between yet other such points and areas;

b) by reducing the scope of prior operations in the transportation of other frozen foods expressly characterized by the statute as exempt from future regulation;

c) by refusing to consider the full scope and effect of seasonal and other variations in the applicant's prior business?

STATUTES INVOLVED.

Section 203 (b) (6) of the Interstate Commerce Act, 49 U. S. C., § 303 (b) (6), and Sections 7 (a) and (c) of the Transportation Act of 1958, PL 85-625, 85th Cong., 2nd Sess., are set forth in Appendix E hereto.

STATEMENT.

Appellant, plaintiff below, is a common carrier of freight by motor vehicle operating in interstate commerce. This action was brought in the Court below to suspend, set aside and permanently enjoin orders of the Interstate Commerce Commission (hereinafter "ICC" or "Commission"), dated September 27, 1961, and February 7, 1962, in so far as those orders deny motor carrier operating authority sought by Appellant under Section 7 (c) of the Transportation Act of 1958, 72 Stat. 574.

(1) Statutory Background.

Section 7 of the Transportation Act of 1958 sharply reduced the scope of the partial exemption from Commission economic regulation granted to motor carrier transportation of certain agricultural commodities by Section 203 (b) (6) of the Interstate Commerce Act, 49 U. S. C., § 303 (b) (6). The 1958 Act simultaneously directed the Commission to issue "grandfather" authority, commensurate with the scope of prior unregulated operations, to carriers that had previously transported, as exempt, the classes of commodities thereafter made subject to regulation.

Prior to its amendment by Section 7 (a) of the 1958 Act, Section 203 (b) (6) of the Interstate Commerce Act had

exempted from economic regulation by the Commission any motor vehicle carrying "ordinary livestock, fish (including shell fish), or agricultural . . . commodities (not including manufactured products thereof)," if such vehicle did not also carry any other property at the same time, **Interstate Commerce Commission v. Dunn**, 166 F. 2d 116 (5th Cir., 1948). The precise scope of this exemption, particularly of the parenthetical "manufactured products" clause of the agricultural exemption, had been the subject of repeated litigation before the Commission and in the Courts. Over a period of years prior to 1958, the views of the I. C. C. and the Courts had sharply diverged in interpreting the term "manufactured products"; particularly as it related to frozen agricultural products. The Commission took the restrictive view of the exemption that any processing, such as freezing, was "manufacture". This Court, on the other hand, evolved the position that processing was not "manufacture" so long as the particular product in issue retained a "continuing substantial identity" with the unprocessed agricultural product. Pursuant to that test, the Courts by 1957 had held, overruling the Commission's view, that such commodities as frozen eviscerated chickens, frozen fish, frozen fruits and vegetables and frozen cream were exempt.[1]

Continuing doubt on the part of shippers and carriers as to the exemption status of a variety of frozen agricultural commodities, and the declared desire of the Com-

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[1] Compare *Lester C. Newton—Extension*, 43 M. C. C. 787 (1944); *Monark Egg Corporation—Application*, 44 M. C. C. 15 (1944); *Determination of Exempted Agricultural Commodities*, 52 M. C. C. 511 (1951); *W. W. Hughes—Extension—Frozen Foods*, 71 M. C. C. 457 (1957); with *East Texas Motor Freight Lines v. Frozen Food Express et al.*, 351 U. S. 49 (1956); *Home Transfer & Storage Co. v. United States et al.*, 141 F. Supp. 599 (W. D. Wash., 1956), aff'd 352 U. S. 884; *Frozen Food Express v. United States et al.*, 148 F. Supp. 399 (S. D. Tex., 1956), aff'd 355 U. S. 6 (1957).

mission, and of motor carriers then subject to economic regulation, to bar expansion of, and if possible, to contract, the scope of the exemption, created increasing demands, in 1957, for clarifying and restrictive amendment of the exemption.[2]

In March, 1958, while Congressional committee consideration of such legislation was pending, the Commission's Bureau of Motor Carriers issued its Administrative Ruling No. 107, 49 C. F. R. 210.25. That document listed specific commodities together with a statement of their status, as exempt or non exempt, under the Bureau of Motor Carriers' interpretation of relevant Court and Commission decisions. Where, in its view, there were no such decisions extant with respect to the status of particular commodities, that Bureau gave its own "tentative and provisional" opinions. Ruling 107 indicated, *inter alia*, that frozen uncooked fish and shellfish, and frozen fresh fruits, berries, and vegetables, were exempt from regulation.

The Transportation Act of 1958 was enacted in August, 1958. Section 7 (a) of that Act, 72 Stat. 573, 574, amended the agricultural exemption provided by Section 203 (b) (6) of the Interstate Commerce Act:

> 1. By a first proviso incorporating by reference in the statute, *in toto*, the interpretations of Ruling 107's commodity list.

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[2] See, e. g., *Interstate Commerce Act—Agricultural Exemptions. Hearings Before a Subcommittee of the Committee on Interstate and Foreign Commerce*, House of Representatives, Eighty-Fifth Congress, 2nd Session, on H. R. 5823, April 23-25, 1958, U. S. G. P. O. 1958; *Transportation Act of 1958—Report of the Committee on Interstate and Foreign Commerce on S. 3778*, S. Rep. No. 1647, Eighty-Fifth Congress, 2nd Session, U. S. G. P. O., 1958, at pp. 22, 23; and *60th Annual Report of the Interstate Commerce Commission*, U. S. G. P. O. Washington 1956, p. 128; *70th Annual Report*, U. S. G. P. O., Washington, 1957, p. 162; *71st Annual Report*, U. S. G. P. O., Washington, 1957, pp. 138, 139.

2. By a second proviso providing, "notwithstanding the preceding proviso" that 11 specified commodities, including, so far as pertinent here, "frozen fruits, frozen berries, frozen vegetables" were removed from the scope of the exemption. That proviso expressly exempted "cooked (including breaded) fish or shellfish when frozen or fresh," with certain exceptions not relevant here (Appendix E, *infra*, p. 65).

Transportation of frozen fruits, berries, and vegetables by motor carrier was thereby prohibited in the future except under appropriate Commission certification, and at rates subject to Commission control. The frozen fish and seafood exemption was broadened, rather than restricted, by the amendment. Under the Commission's construction of the statute, however, transportation of still exempt commodities in the same vehicle with frozen fruits, berries and vegetables would thereafter also be prohibited without appropriate Commission authority.[3]

Section 7 (c) of the 1958 Act directed the Commission to grant "grandfather" rights to any person, or its predecessor in interest, who had been in bona fide operation on May 1, 1958, and since that time (making due allowance for seasonal, and other service interruptions beyond its control) in the transportation of "property—made subject to" regulation by Section 7 (a). Section 7 (c) provided for a grant of operating authority, commensurate geographically and otherwise with prior unregulated operations, to any such person filing application therefor within 120 days after the statute's effective date, August 12, 1958 (Appendix E, *infra*, p. 65).

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[3] See, e. g., *Blair M. Lewis, Common Carrier "Grandfather" Application*, 82 M. C. C. 755 (1960).

(2) **Proceedings on Appellant's "Grandfather" Application.**

Appellant had engaged, for a number of years prior to May 1, 1958, and continued thereafter, in the interstate motor common carriage of a variety of frozen agricultural commodities deemed exempt from Commission regulation under Section 203 (b) (6) as it stood prior to August 1958. It was among the 950 applicants[4] which timely filed "grandfather" applications pursuant to Section 7 (c). It sought operating authority, so far as pertinent here, to transport frozen fruits, frozen berries and frozen vegetables over irregular routes, from and to points in 35 states.[5] It sought to continue the full scope of its transportation of commodities remaining within the exemption by also requesting authority to transport such commodities as frozen fish and seafood, when moving in the same vehicle with the newly regulated commodities, throughout the territory covered by the application.

Hearing on the application was held before an Examiner of the Commission in October 1961. Several motor carriers, railroads, and railroad associations opposed.

The evidence was that Appellant[6] began its motor carrier business in 1938, transporting principally fresh prod-

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[4] *77th Annual Report of the Interstate Commerce Commission*, U. S. G. P. O. 1961, p. 52.

[5] Alabama, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, New York, Oklahoma, Oregon, Ohio, Pennsylvania, Tennessee, Texas, Utah, Virginia, Washington and Wisconsin.

[6] Appellant, Willis Shaw Frozen Express, Inc., succeeded to the interest of Willis Shaw Produce Co., a partnership, in 1958. Both companies will be referred to here, for convenience, as "Appellant."

uce and live poultry from the base of operations that it still occupies, at Elm Springs, Arkansas. It has been engaged continuously since 1948 in transportation of frozen exempt foods. Since 1954, Appellant has advertised the availability of its refrigerated vehicles, for transportation of such commodities, unlimited geographically, in trade magazines which circulated throughout the 35 states covered by the application (R. 79-84).

The frozen commodities moved by Appellant in the critical period were transported from processing plants and cold storage warehouses. Interstate shipments by a given shipper would originate, at different times, from different points within a given area. For example, a freezing plant at Searcy, Arkansas, with limited storage facilities at that point, would ship its products for storage and later shipment, to other Arkansas points, *inter alia*, such as Fayetteville, Ft. Smith, Little Rock and Van Buren. Shipments from different origin areas varied with the growing season of the areas' principal crops. Origins also varied as new processing plants were erected. The pooling of smaller shipments in a single truckload for delivery at a number of destinations, often in different states, was commonplace. The various commodities to be shipped in a given truckload were sometimes stored in warehouses at different points, in which case Appellant's vehicles would be required to pick up parts of the shipment at several points of origin, sometimes located in different states (R. 7, 98-102, 407-525).

Appellant's Exhibit 22 (R. 407-525) showed some 6,000 of the shipments of frozen fruits, vegetables and berries that it had transported in the period May 3, 1954-October 19, 1960.[7] Shipments of frozen fish were also transported,

[7] Some 2,000 other shipments were excluded by Appellant from its Exhibit 22, as repetitive of movements between the same origins and destinations included in the Exhibit (R. 148).

in the period January 11, 1956-September 24, 1960, in mixed shipments with frozen fruits, vegetables and berries (R. 104-117, 232-236).

By Report and Recommended Order served May 4, 1961, the Examiner proposed a grant of authority to transport the entire class of formerly exempt frozen agricultural commodities (frozen fruits and berries and vegetables) throughout territories severely restricted relative to the broad geographic showing of holding out and bona fide operation made by Appellant. The Examiner also recommended a severely limited grant of authority to transport frozen fish in the same vehicle with frozen fruits, vegetables and berries (Appendix C, *infra*, p. 52).

Both Appellant and protestants filed exceptions to the Examiner's recommendations. The Commission, by Report and Order on Exceptions (Appendix B, *infra*, pp. 28-43) substantially reduced the scope even of the limited authority recommended by the Examiner,[8] and denied Appellant's petition for reconsideration of that disposition. The Commission limited Appellant to authority to transport:

> (a) the entire class of frozen agricultural commodities expressly made subject to regulation by the 1958 statute (frozen fruit, frozen berries, and frozen vegetables) from points in the three West Coast states, from Lower Michigan and from Chicago, to points in seven middle western states;
>
> (b) Frozen fruit, but not vegetables or berries
>
> (1) from Omaha, Nebraska, to Modesto, California.

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[8] A statement of the authority recommended by the Examiner, as compared with that granted by the Commission (R. 714-718), is set out in Appendix D, infra, pp. 56-63.

(2) from points in the Lower Peninsula of Michigan to St. Joseph, Mo., Oklahoma City, Okla., Omaha, Nebraska, and points in Kansas.

(c) frozen vegetables, but not fruit or berries

(1) from Omaha, Nebraska, to points in Arkansas.

(2) from Ft. Smith, Arkansas, to Detroit, Michigan, Miami and Jacksonville, Florida, and San Francisco, Calif.

(3) from points in Delaware to points in Arkansas.

(4) from points in Minnesota on and south of U. S. Highway 14 to Omaha, Nebraska, Kansas City and St. Joseph, Mo., Oklahoma City, Okla., and points in Arkansas and Kansas.

(d) frozen berries, but not fruit or vegetables, from Ft. Smith, Arkansas, to Chicago, Illinois.

It also granted authority to transport frozen fish when moving in the same vehicle and at the same time with frozen fruits, frozen vegetables, or frozen berries from specified Pacific seacoast points only, to a number of states.

In concluding that the authority to be awarded Appellant should be so limited the Commission expressly refused to consider as relevant, the evidence of service performed by Appellant prior to 1957 (Appendix B, p. 29, *infra*).

The Commission's disposition of Appellant's "grandfather" application substantially and injuriously reduced and fragmented the scope of the operations that Appellant had held itself out to perform, and had in fact performed in the relevant period of "grandfather" opera-

tions. That injurious result was brought about by three fundamental Commission errors:

1. The Commission failed and refused to treat the frozen foods made subject to regulation by Section 7 (a) of the 1958 Act as a unitary commodity class. The nature of frozen fruits, frozen berries and frozen vegetables as sub-categories of a single class of commodities having identical transportation characteristics and requirements, with respect to refrigeration and otherwise, is not subject to question. Appellant transported all of these sub-categories. The record as a whole shows that Appellant's only criterion was whether the commodities transported were among the frozen foods exempt from regulation under Section 203 (b) (6)—as it stood prior to the 1958 amendment; that any failure actually to transport frozen commodities in all three of these overlapping categories between any given pair of points was more a matter of chance than of choice[9] (R. 407, 525). Prior to enactment of the 1958 Statute, there was, in fact, no rational basis for any unregulated carrier, operating equipment designed for frozen food transportation, to differentiate for transportation purposes among frozen exempt food items on the basis of the distinctions later created by statute.

The Commission conceded, by the terms of its grant of authority, that Appellant had actually transported all three sub-categories over broad areas, pp. 10-11, *supra*. Nevertheless, it limited authority from a number of points or areas to a single sub-category of the commodity class involved; and in a number of instances, authorized trans-

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[9] The situation of frozen fish prior to regulation was no different. Although accorded different treatment by the 1958 statute, that commodity too, was indistinguishable, in terms of transportation characteristics, from any other type of frozen food exempted prior to 1958.

portation from a single origin of one such item to some destinations, and of another such sub-category to other destinations.

2. The Commission failed and refused to consider any evidence of Appellant's operations prior to January 1957. The evidence was that origins and destinations and identity of the commodities shipped between particular points varied within given areas, with considerations peculiar to the shippers' business and the seasonal nature of commodities shipped; see p. 9, *supra*. On that kind of record, the Commission's refusal to consider any evidence prior to January, 1957, less than two full growing seasons prior to the May 1, 1958, date specified in the statute, is flatly erroneous. That refusal, combined with the Commission's atomizing treatment of the commodities involved resulted in a substantial reduction in the geographic, as well as the commodity, scope of operations previously conducted by Appellant. The injurious diminution in the scope of Appellant's business resulting from the combination of those errors, is made apparent by consideration of a specific example from the record:

The Commission's grant of authority from Arkansas was limited to frozen vegetables only, from Ft. Smith, Arkansas, to Detroit, Miami, Jacksonville, and San Francisco, and frozen berries only, from the same origin point to Chicago. The restrictive and injurious impact upon Appellant's ability to conduct a viable operation even from its home territory, appears from the face of the grant. It is accentuated by the evidence supposedly considered by the Commission, as well as by the pre-1957 evidence.

Appellant has reproduced, on the facing page, the relevant data from the record showing the interstate shipments transported by it from origins in the northwest Arkansas quadrant in the period January 1, 1956-August 19, 1958. That evidence shows that, with the exception of four instances all shipments moved in the period between April 1 and late October. The May 1 grandfather date thus cut off the major part of the 1958 season for shipment of the commodities involved from Arkansas origins. The Commission's determination was made, therefore, on the basis, essentially, of a single season's operations. When the 1956 season is considered the area-wide origins (Ft. Smith, Van Buren, Fayetteville, Prairie Grove, Little Rock), the broad scope of the holding out to transport the entire class of commodities and to serve broad destination areas is apparent. Repetitive service to a number of destinations before and after the "grandfather" date (e. g., Kansas City, Kansas-Missouri, Philadelphia-Camden) was entirely ignored.

In the period shown Appellant delivered shipments from the various Arkansas origins to 25 different cities in 17 states. It moved shipments including berries to 18 points, vegetables to 22, and fruit to two. If Appellant were tendered these same shipments today, it could lawfully transport four truckloads and one partial load. The authority is so restricted, in fact, that although the Commission granted destination authority to Chicago, no one of the four post-1956 shipments transported by Appellant to that city from Fort Smith could lawfully be moved under the authority granted because each consisted wholly, or in part, of a commodity not covered by the Chicago authority.

The Commission's treatment of Arkansas origin authority is merely exemplary. See, e. g., its treatment of Lower

Shipments of Frozen Fruits, Vegetables and Berries Originated by Appellant at Northwest Arkansas Points, January 1, 1956-August 19, 1958 (From Appellant's Exhibit 12, R. 407-525).

(Bold-face entries indicate shipments that could not be handled by Appellant under authority granted by the Commission. Asterisks indicate commodity, origin or destination disqualifying Appellant from transportation of shipment under authority granted by I. C. C.)

[Record Page of Entry]	[Date]	[Freight Bill No.]	[Commodity]	[Origin]	[Destination]
421	1-18-56	1132	**Frozen Vegetables**	**Fort Smith, Arkansas**	**Kansas City, Mo.***
422	2-10-56	1203	**Frozen Vegetables**	**Fort Smith, Arkansas**	**Kansas City, Mo.***
423	3-15-56	1309	**Frozen Vegetables**	**Van Buren, Arkansas**	**New York, New York***
423	4-10-56	1384	**Frozen Vegetables**	**Fort Smith, Arkansas**	**Kansas City, Mo.***
424	5-12-56	1514	**Frozen Berries**	**Fort Smith, Arkansas**	**Minneapolis, Minn.***
424	5-14-56	1529	**Frozen Berries**	**Little Rock, Arkansas***	**Kansas City, Kansas***
424	5-15-56	1511	**Frozen Vegetables**	**Fort Smith, Arkansas**	**Kansas City, Mo.***
424	5-16-56	1541	**Frozen Berries**	**Little Rock, Arkansas***	**Elkhart, Indiana*** **Kankakee, Ill.***
425	5-20-56	1558	**Frozen Berries**	**Little Rock, Arkansas***	**St. Joseph, Mo.*** **Kansas City, Mo.*** **Pittsburg, Kansas***
425	5-23-56	1561	**Frozen Berries**	**Fort Smith, Arkansas**	**Minneapolis, Minn.***
425	6- 7-56	1620	**Frozen Berries**	**Prairie Grove, Ark.***	**Dallas, Texas***
425	6-12-56	1627	**Frozen Berries**	**Prairie Grove, Ark.***	**Des Moines, Iowa***
428	9-20-56	1977	Frozen Vegetables	Fort Smith, Arkansas	Birmingham, Ala.*
			Frozen Vegetables	**Fort Smith, Arkansas**	**Tampa, Florida***
429	10-20-56	2057	Frozen Berries	Fort Smith, Arkansas	Chicago, Illinois
433	4- 8-57	2724	**Frozen Fruit***	**Van Buren, Arkansas**	**Houston, Texas***
433	4-13-57	2735	**Frozen Vegetables**	**Fort Smith, Arkansas**	**Atlanta, Georgia***
			Frozen Vegetables	Fort Smith, Arkansas	Jacksonville, Florida
434	4-29-57	2912	**Frozen Vegetables**	**Fayetteville, Ark.***	**Camden, New Jersey***
437	7- 3-57	3165	Frozen Vegetables	Fort Smith, Arkansas	Miami, Florida
440	9- 6-57	3398	**Frozen Berries**	**Fort Smith, Arkansas**	**Buffalo* and Amsterdam,* New York**
449	3- 7-58	4031	Frozen Vegetables	Fort Smith, Arkansas	San Francisco, Calif.
452	4-26-58	4205	Frozen Vegetables	Fort Smith, Arkansas	Detroit, Michigan
			May 1, 1958		
452	5- 7-58	4244	**Frozen Vegetables**	**Fort Smith, Arkansas**	**Philadelphia, Pa.*** **Camden, New Jersey***
452	5- 7-58	4246	**Frozen Vegetables***	**Fort Smith, Arkansas**	**Chicago, Illinois**
453	5-24-58	4300	**Frozen Vegetables**	**Fort Smith, Arkansas**	**Kansas City, Kansas***
454	6- 6-58	4321	**Frozen Veg.* & Berries**	**Fort Smith, Arkansas**	**Chicago, Illinois** **St. Louis, Missouri***
454	6-13-58	4357	**Frozen Veg.* & Berries**	**Fort Smith, Arkansas**	**Chicago, Illinois**
454	6-17-58	4362	**Frozen Vegetables**	**Fort Smith, Arkansas**	**Exmore, Va.***
456	7-28-58	4519	**Frozen Fruits* & Veg.**	**Fort Smith, Arkansas**	**Detroit, Michigan**
457	8-19-58	4589	**Frozen Veg.* & Berries**	**Fort Smith, Arkansas**	**St. Louis, Mo.*** **Chicago, Illinois***

Michigan origins, Appendix D, p. 59, *infra*. Although the Commission granted authority to transport all three of the statute's sub-categories from points in the Lower Peninsula of Michigan to Kansas City, Missouri, it limited Appellant to transportation of "frozen fruit" only from the same origin area to points in Kansas, across the Missouri River from Kansas City, Missouri; to St. Joseph, Missouri, a short distance north of Kansas City; to Omaha and Oklahoma City in the adjacent (to Missouri) states of Nebraska and Oklahoma. The pre-1957 record shows that Appellant had transported other commodities from lower Michigan to each of the destination points (other than Omaha) to which Appellant is now denied authority to transport any item other than frozen fruit (R. 409, 413, 417, 424).

3. The Commission denied authority to Appellant to continue to transport frozen fish and seafood, in the same vehicle with frozen fruits, berries and vegetables, throughout the scope of the entire authority granted to transportation of frozen fruits, berries and vegetables. It thus effectively destroyed Appellant's pre-existing right to transport frozen fish and seafood in mixed shipments with the formerly exempt commodities expressly made subject to regulation.

The treatment of this aspect of Appellant's application resulted from an apparent inability on the part of the Commission to comprehend the full meaning of the statute it was directed to administer.

Prior to the 1958 Transportation Act, frozen, uncooked, fish and seafood could be transported without Commission authority, not only in unmixed loads but in the same vehicle with then-exempt frozen fruits, berries and vege-

tables. While Section 7 (a) of the 1958 Act expressly made frozen fruits, berries and vegetables subject to regulation, it actually expanded the frozen fish and seafood exemption; indicating an intent to permit at least the same degree of freedom in the opportunity to offer the unregulated transportation of frozen fish and seafood that existed prior to the enactment of Section 7. Prior to enactment of the statute carriers could offer to transport frozen fish and seafood, alone, or in mixed shipments with exempt frozen fruits, vegetables and berries whenever, and wherever they chose. That opportunity would no longer remain open to carriers if those seeking incidental "grandfather" authority to continue to offer to transport in such mixed shipments were to be limited by the same standards of proof of actual transportation required to support a grant of frozen fruits, vegetables and berries authority.

Relying upon its showing of actual past transportation of frozen fish, upon its prior broad holding out to transport exempt frozen foods generally, and the clearly implicit statutory intent to preserve, untrammelled, the opportunity to continue such a holding out within the scope of the remaining exemption, Appellant sought "grandfather" authority to transport frozen fish and seafood in the same vehicle with frozen fruits, berries and vegetables throughout the territory in which fruit, vegetables and berry authority was sought.

The Commission granted Appellant authority, as relevant here, to transport

> "frozen fish [only], when moving in the same vehicle and at the same time with frozen fruits, frozen vegetables, or frozen berries from Seattle, Wash., and Astoria, Oregon . . . and from San Francisco, Monterey,

San Jose, and Los Angeles, Calif. [to points in named mid-Western states]".

That grant of authority destroys any opportunity for Appellant to continue to offer the same broad service. Moreover, the effect of that limited grant is to give Appellant far less than substantial parity even with its prior actual carriage of frozen fish, as shown by the evidence.

The preponderance of Appellant's previous movement of frozen fruits, vegetables and berries from the West Coast states was from inland points, whereas its movements of fish were, of course, from the seaports. The Commission's grant limits Appellant to origination of mixed shipments of fish and "grandfather" commodities only at the seaport points; but grants no rights to commence mixed shipments at the inland points where the "mixing" could normally be expected to occur and where the regulated movements of fish would thus originate.

If, for example, Appellant, with a vehicle available for loading at San Francisco, were notified of a partial load of eastbound frozen fish at that point and of eastbound frozen vegetables at the inland California point of Modesto, it could handle both shipments in that vehicle only by moving its empty vehicle east to Modesto to partially load the vegetable shipment; then return west to San Francisco, mix in the fish shipment at that point and again turn eastward for movement to destination. In lieu of the flexibility of operations so vital to the efficiency of a broad-ranging motor truck operation in combining multiple pick-ups and delivery of partial truckloads at numerous points, the Commission imposed an operational straitjacket upon Appellant's operations that had never existed prior to 1958. It did so in direct contradiction to its own conclusion that a "comparatively broad grant of

[frozen fish] rights is warranted to allow continued flexibility in applicant's operations" (Appendix C, p. 53, *infra.*)

Following the Commission's denial of Appellant's petition to reconsider its decision in light, *inter alia,* of the errors outlined above, Appellant filed its Complaint in the Court below on March 29, 1962, seeking a permanent injunction against enforcement of the Commission's Orders.[10] The United States and Interstate Commerce Commission answered and, after briefing and oral argument by the parties, the statutory three-judge District Court convened to hear and decide this case entered an Order summarily affirming the Commission's action. It found that the Commission had "correctly employed the statutory standards prescribed" in the grandfather clause of Section 7 (c) of the Transportation Act of 1958, and "did not use a new or different standard in interpreting [that clause] than it did in interpreting the 'grandfather' clause of the predecessor statute, the Motor Carrier Act of 1935, 59 [sic] U. S. C., Sec. 306 (a)" (Appendix A, *infra,* p. 26).

Appellant moved for rehearing, relying upon the opinion of the statutory three-judge District Court in **The Winter Garden Company, Inc., et al. v. United States et al.**, 211 F. Supp. 280 (E. D. Tenn. 1962) (R. 721, 739). That Court held that the Commission in considering applications under the 1958 "grandfather" clause, must (1) treat frozen fruits, berries and vegetables as a single commodity class, and (2) consider operations conducted prior to 1957 in determining the scope of "grandfather" authority to be granted, where specific origin and destination points within a given area vary with seasonal fluctuations and

[10] The effective date of those Orders was postponed indefinitely by the Commission following filing of the Complaint (R. 703, 704).

changes occasioned by availability of freezer space and other controlling business conditions.

Appellant's motion was denied without opinion by Order of the Court below, entered March 8, 1963 (R. 742). Appellant's Notice of Appeal was filed in that Court on April 11, 1963 (R. 743).

THE QUESTIONS INVOLVED ARE SUBSTANTIAL.

1. This appeal raises the fundamental question whether the Interstate Commerce Commission may administratively restrict legislation plainly intended to preserve existing businesses, under regulation, on a substantial parity with their pre-regulation scope; whether that Commission may, in administration of the 1958 "grandfather" statute properly apply different and more restrictive criteria than those laid down by this Court in **United States v. Carolina Freight Carriers Corp.**, 315 U. S. 475. That decision had affirmed a District Court reversal of an overly restrictive Commission grant of motor carrier operating authority under the original "grandfather" provision of the Motor Carrier Act, 49 U. S. C., § 206 (a). The Court there reiterated its holding in **Alton Railroad Company et al. v. United States et al.**, 315 U. S. 15, that the purpose of that "grandfather" clause was to assure affected carriers "a substantial parity between future operations and prior bona fide operations," 315 U. S. 479, 481. The original "grandfather" clause, 49 U. S. C., § 306 (a), like that in the 1958 Act, required a showing that applicant or its predecessor was "in bona fide operation" on the critical date, and Section 203 (a) (14) of the Motor Carrier Act, then defined "common carrier by motor vehicle," as it does today, as one who "undertakes to transport . . . property, or any class or classes of property, for the general public." This Court held there that

"The Commission may not atomize [the applicant's] prior service, product by product, so as to restrict the scope of his operations, where there is substantial evidence in addition to his holding out that he was in 'bona fide operation' as a 'common carrier' of . . . a whole class or classes of property. There might be substantial evidence of such an undertaking though the evidence as to any one article was not substantial. The broad sweep of his prior service may indeed have made the carriage of any one commodity irregular and infrequent. Yet viewed as a whole rather than as a group of separate and unrelated items, his prior activities may satisfy the test of 'bona fide operation' as a 'common carrier' within the scope of his holding out. The fact that some of the articles may have been carried before but not after June 1, 1935, may of course indicate an abandonment of the prior undertaking . . . But it does not necessarily mean that they should be stricken from the certificate, since the natural and normal course of his business may reveal a continuous undertaking to transport any or all commodities embraced within the group or the class . . . The questions are whether his service within the territory in question was sufficiently regular and whether his coverage of commodities was sufficiently representative to support a finding that he was in 'bona fide operation' as a 'common carrier' . . . of the class or classes of property during the periods in question.

". . . if the applicant had established that it was a 'common carrier' for a group of commodities or for an entire class or classes of property and was in 'bona fide operation' during the critical periods in a specified territory, restrictions on commodities which could be moved in any one direction or between designated points would not be justified. The fact that a particular commodity had never been transported be-

> tween certain points in that territory would not mean that authority to haul it between them should be withheld. Likewise, if the applicant could establish that it was a 'common carrier' only of a limited number of commodities, there would normally be no statutory sanction for limiting the carriage of particular commodities, in that group to specified points in the authorized area. Presumptively one who had established his status of 'common carrier' would be entitled to carry all of the commodities embraced in his undertaking to all points to which any shipment of articles were authorized . . .," 315 U. S. 479, 483-486.

The decisions of the Commission, and of the Court below, in this proceeding are in palpable violation of the quoted principles enunciated in **Carolina Freight Carriers.**

2. The decision of the Court below in this proceeding, moreover, is in direct conflict with the opinion of the three-judge District Court in **Winter Garden**, *supra*, p. 19. Although unlike the **Winter Garden** decision the ruling of the Court below was unaccompanied by an opinion, that decision, and the opinion of the Commission which it sustains, are public information to affected carriers and shippers, and other interested persons, including the lower Federal Courts that may be called upon for future rulings in "grandfather" cases. This court has, to date, been presented with no opportunity to consider the issue of the propriety of the Commission's economically injurious atomization of commodity classes and geographic scope of operations, in administering the transition of almost 1,000 business units from free to regulated competition.[11] The

[11] Although the Commission and the United States argued to the Court below in this case that the decision in Winter Garden adverse to them "was erroneous as a matter of law" (R. 740), they made no effort to obtain review of that "erroneous" decision by this Court.

conflict between **Winter Garden** and **Carolina Freight Carriers**, on the one hand, and on the other, the disposition below and other summary decisions of three-judge Courts in accord with it, will remain a source of continuing confusion and uncertainty in administration of the 1958 "grandfather" statute absent a definitive disposition by this Court.

Respectfully submitted,

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Fayetteville, Arkansas,

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Attorneys for Appellant.

APPENDIX A.

In the United States District Court,
Western District of Arkansas,
Fort Smith Division.

Willis Shaw Frozen Express, Inc., a Corporation, Elm Springs, Arkansas,

Plaintiff,

v. Civil Action No. 1655.

United States of America and Interstate Commerce Commission,

Defendants.

Before: M. C. Matthes, Circuit Judge,
John E. Miller and
J. Smith Henley, District Judges.

Judgment.

The court having fully reviewed and considered the whole record, the brief of plaintiff submitted on July 17, 1962, in support of its complaint, the brief of defendants submitted on September 4, 1962, in opposition to the complaint, the arguments and contentions of the parties contained in the briefs and the oral argument of counsel, the pertinent authorities, together with a comparative statement of the operating authority to which the examiner found the plaintiff entitled under Sec. 7 (c) of the Transportation Act of 1958 with that granted by the Commission, Division 1, in the report and order dated September 27, 1962, and contrary to the contentions of plaintiff, the court finds:

1. That the findings and conclusions of the Commission are not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law;

2. That the Commission observed the procedure required by law;

3. That the findings of fact of the Commission, as set forth in its report and order dated September 27, 1961, and served October 5, 1961, are supported by substantial evidence;

4. That the Commission, in applying the provisions of Sec. 7 (c) of the Transportation Act of 1958 (72 Stat. 573, following 49 U. S. C., Sec. 303), commonly referred to as the "grandfather" clause, correctly employed the statutory standards prescribed by Congress in said Act, and that said Commission did not use a new or different standard in interpreting the clause than it did in interpreting the "grandfather" clause of the predecessor statute, the Motor Carrier Act of 1935, 59 U. S. C., Sec. 306 (a).

It Is, Therefore, Ordered and Adjudged that the complaint of plaintiff be, and is, dismissed.

This 11 day of February, 1963.

(S) M. C. Matthes,
United States Circuit Judge,
(S) Jno. E. Miller,
United States District Judge,
(S) J. Smith Henley,
United States District Judge.

In the United States District Court,
Western District of Arkansas,
Fort Smith Division.

Willis Shaw Frozen Express, Inc.,

Plaintiff,

v. Civil Action No. 1655.

United States of America and Interstate Commerce Commission,

Defendants.

Order.

Upon consideration of the Plaintiff's motion for rehearing or reargument, and the defendant's reply thereto, and the court being well and sufficiently advised in the premises is of the opinion that the said motion should be denied.

It Is, Therefore, Ordered and Adjudged that the plaintiff's motion for rehearing or reargument be, and is, denied.

This 8 day of March, 1963.

/s/ M. C. Matthes,
United States Circuit Judge,
/s/ Jno. E. Miller,
United States District Judge,
/s/ J. Smith Henley,
United States District Judge.

APPENDIX B.

This report will not be printed in full in the permanent series of Motor Carrier Reports of the Commission.

Date of Service Oct. 5, 1961.

Interstate Commerce Commission.

No. MC-117119 (Sub-No. 2).

Willis Shaw Frozen Express, Inc., Common Carrier "Grandfather" Application.

Decided September 27, 1961.

Applicant found entitled to continue operations as a common carrier by motor vehicle, over irregular routes, of specified commodities from and to described points in 14 States, by reason of having been engaged in such operations on and continuously since May 1, 1958. Issuance of a certificate approved upon compliance by applicant with certain conditions, and application in all other respects denied.

A. Alvis Layne, Jr., and John H. Joyce for applicant.

Charles L. Ford, Jr., Earl J. Brooks, and Hugh T. Matthews for protestants.

Report of the Commission.

Division 1, Commissioners Walrath, Webb, and Tucker.

Tucker, Commissioner:

Exceptions were filed by applicant and one protestant to the order recommended by the examiner, and each replied to the exceptions of the other. Our conclusions differ somewhat from those recommended.

By application filed December 5, 1958, Willis Shaw Frozen Express, Inc., of Elm Springs, Ark., seeks a certificate under the "grandfather" proviso of Section 7 (c) of the Transportation Act of 1958, authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle, of frozen fruits, frozen berries, frozen vegetables, frozen poultry, frozen poultry parts, frozen fish and other frozen seafood, including seafood pies, meals, and dinners, from and to points in Alabama, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, New York, Oklahoma, Oregon, Ohio, Pennsylvania, Tennessee, Texas, Utah, Virginia, Washington and Wisconsin, over irregular routes. The application is opposed by Class I Rail Carriers in the Western District, The Texas Railroad Association and numerous rail and motor carriers.[1]

The examiner recommended that the application be granted to the extent set forth in part A of the Appendix hereto. On exceptions applicant contends (1) that the examiner incorrectly restricted his attention to operations conducted since October 1, 1957, (2) that its Exhibit No. 21 should have been admitted into evidence, and (3) that it will be denied substantial parity with its past operations unless it is granted all the authority sought. It says that the "pro numbers" of the poultry shipments listed in Exhibit No. 21 should be matched with the pro numbers of the frozen fruit, berry, and vegetable shipments listed in Exhibit No. 22 to establish the scope of its mixed shipment operations with respect to these commodities. Pacific

[1] New York Central Railroad, Louisville & Nashville Railroad, Boston & Maine Railroad, New York, New Haven and Hartford Railroad; Chicago, Rock Isalnd & Pacific Railroad, Pacific Intermountain Express Co., Gillette Motor Transport, Inc., and Western Truck Lines, Ltd.

Intermountain Express Co., hereafter called P. I. E., argues on exceptions (1) that the authority granted should be no more than that set forth in part B of the Appendix hereto, (2) that the examiner's recommendation is based in part on shipments which were not bona fide because of an admixture of commodities the transportation of which was subject to economic regulation, and (3) that fish, poultry, and the related products included in the application were not listed in the Federal Register publication and, therefore, should not be considered. Applicant replies (1) that any defect in the published notice of the application can be corrected by republication, (2) that the status of frozen food has been so confused that applicant should not be penalized for transporting frozen french fried potatoes in mixed shipments with frozen fruit, berries, and vegetables, and (3) that exceptant eliminated many bona fide shipments listed in Exhibit No. 22 from its computation of the authority to be granted because they were wrongfully categorized as private carriage. In reply exceptant asserts that applicant failed to conduct bona fide operations to or from any points beyond those conceded in P. I. E.'s exceptions, apart from a few instances involving long and unexplained interruptions in service.

The evidence, the examiner's recommendations, the exceptions and replies thereto have been considered. We find the statement of facts in the examiner's report to be correct; and, as supplemented herein, we adopt it as our own.

1. **Preliminary Matters.**

Applicant's evidence was adduced principally in the form of four exhibits. Exhibit No. 20 shows shipments of frozen fish. Exhibit No. 21 lists shipments of iced and frozen poultry. Exhibit No. 22 records shipments of frozen

fruit, berries, and vegetables, and a late-filed exhibit contains photostats of the supporting documents for 107 shipments which applicant asserts were for-hire carriage and exceptant insists were not. The examiner refused to accept Exhibit No. 21 in evidence because it was offered for the specific purpose of showing that, at the destinations listed therein, applicant had empty vehicles available for transportation of frozen fruit, berries, vegetables, fish, and seafood products. In rejecting this exhibit, the examiner ruled that only the operations actually performed by applicant could be considered as the basis for a grant of the authority sought. Each shipment in the exhibits is identified by a pro number which corresponds to the serial number of the loading sheet on which it is listed. Every loading sheet, however, represents a round trip which usually involved an outbound movement, a backhaul, and one or more intermediate hauls; therefore, many mixed and consecutive shipments bear the same pro number. Also in some cases underlying documents for these shipments reflect that applicant was considered the broker, consignee, or consignor rather than the common carrier of the commodity. The examiner's ruling, rejecting the exhibit for the purpose it was introduced, was clearly correct. See **Long Common Carrier Application**, 81 M. C. C. 689. Applicant's suggestion that we compare the pro numbers of the approximately 6,000 shipments in Exhibit No. 22 with those of some 15,000 shipments in Exhibit No. 21 is not an entirely practical one, because the pro numbers in Exhibit No. 21 are not organized in numerical or chronological order. Our examination of it indicates, however, that the bulk of the shipments therein were westbound from points in Arkansas, Missouri, and Oklahoma, and a comparison with Exhibit No. 22 shows that applicant had no corresponding movement of frozen fruit, berries, or vegetables. Examining Exhibit No. 21 in an effort to pick out those poultry shipments which seem

geographically compatible with the frozen fruit, berry, and vegetable authority granted below, we found only a few shipments common to both exhibits. This effort did not disclose any pattern which would justify a grant of authority.

A comparison of the frozen fish shipments listed on Exhibit No. 20 with the frozen fruit, berry, and vegetable shipments on Exhibit No. 22 indicates about 25 such mixed shipments moving from the Washington, Oregon, and California origins named by the examiner to destinations served on straight truckloads. Although this number is not large in comparison with the numbers of unmixed shipments, a comparatively broad grant of these rights is warranted to allow continued flexibility in applicant's operations. The grant of authority to transport these mixed shipments, as indicated in the findings herein, is based on these operations.

All of applicant's shipments of the involved commodities moving from Ontario, Oreg., Zillah, Wash., and points in Idaho consisted wholly or partially of frozen french fried potatoes. We therefore omitted from consideration shipments involving these frozen french fried potatoes, and also shipments moving in mixed truckloads with such products. See **Panther Oil and Grease Mfg. Co., Inc., Contr. Car. Applic.**, 84 M. C. C. 393. It may be noted that applicant has another application pending, in No. MC-117119 (Sub-No. 6), in which it is seeking specific authority from certain points in Oregon, Washington, and Idaho, which would comprehend these operations.

In counting mixed shipments of frozen fish and frozen fruits, berries, and vegetables we excluded, of course, consecutive shipments moving under the same pro number. Intrastate shipments were also excluded. We have considered all shipments moving on or after January 1,

1957, but none prior thereto as those were too remote from the statutory date. See **Refrigerated Dispatch Common Carrier Application**, 83 M. C. C. 411.

Protestants presented no evidence except a late-filed exhibit by P. I. E. listing 162 shipments, which it says should documents indicate they moved in private carriage in applicant's so-called "buy and sell" operation which ended about October 1, 1957. Applicant concedes that 55 of these shipments were in private carriage and disputes the status of the remaining 107 in its own aforementioned late-filed exhibit.

In determining whether the operations were for-hire transportation we have applied the primary business test. Compare **A. W. Stickle Co. v. Interstate Commerce Commission**, 128 F. 2d 155, and No. MC-117826, **Anton Gasson Common Carrier "Grandfather" Application**, . . . M. C. C. . . ., (decided June 20, 1961). We conclude that all of the transportation during the critical period was common carriage, even though in some instances applicant may not have regarded it as such.

2. **Grandfather Rights Justified.**

There is ample justification for grandfather rights to transport frozen fruits, frozen berries, and frozen vegetables from points in California, Oregon, and Washington to points in Arkansas, Kansas, Missouri, and Oklahoma, as recommended by the examiner, and since there is no opposition to this, this aspect of the application will not be further discussed.

California origins to other States. There also is adequate support for, and no opposition to, a grant of authority to transport all three commodities from points in California to points in Iowa. Protestant opposes a grant of similar authority to either Omaha, as recommended by

the examiner, or to all of Nebraska as applicant requests, but there is recorded a total of about 15 shipments from several California origins to several Nebraska destinations, including Omaha, which sufficiently establishes a pattern of Statewide operations in transporting these commodities. Protestant contends that applicant should be limited to service to Amarillo, Tex., from four named California origins, but it is evident that several other Texas destinations were served prior and subsequent to the critical date, such as Fort Worth, San Antonio, and El Paso, and we conclude that Statewide authority is warranted. On the other hand, no authority is justified to other destinations, since shipments thereto transported by applicant are shown essentially to have been either only sporadic, or discontinued, or begun subsequent to May 1, 1958. For example, there were a few shipments of frozen vegetables in 1957 to Nashville, Tenn., but none subsequently.

In 1959 there were a few shipments of frozen vegetables to Memphis and Knoxville, Tenn., but none previously through 1957. There is shown a single shipment of frozen berries to Denver, Colo., occurring in 1959, and two similar shipments to Detroit, occurring in 1960. No shipments were shown to Illinois destination subsequent to May 1, 1958, and only a few previously.

Oregon origins to other States. There were single shipments of frozen berries and frozen vegetables transported by applicant in 1957 to Omaha, but none subsequently. A single shipment moved to Spokane, Wash., in 1958 but none in 1957, 1959 or 1960. Also, a single shipment of frozen vegetables from another origin to Denver in early 1958, but none subsequently. Beyond these shipments, applicant's pertinent operations were performed in 1959 or subsequently. No authority greater than that indicated in our findings, therefore, is justified.

Washington origins to other States. No additional shipments are shown to other States during 1957 or the first 4 months of 1958. There were single shipments of frozen fruits and vegetables later in 1958 from Arlington and Prosser, to Denver, but no others subsequently. There is no justification for any additional authority from Washington origins.

Nebraska origins. Applicant transported frozen vegetables from Omaha to several points in Arkansas prior and subsequent to the critical date, and it is entitled to statewide authority for that commodity from Omaha. It also transported frozen fruit from Omaha to Modesto, Calif., before and after the critical date, and should be authorized to continue to do so. Its few other Nebraska originated shipments were sporadic and show no pattern to justify additional authority.

Michigan origins. Protestant concedes that a grant of authority to transport frozen fruit from points in the Lower Peninsula of Michigan to Kansas City, St. Joseph, Oklahoma City and points in Kansas is justified. Additionally, Omaha was served before and after the critical date from Michigan, and it too should be added to this destination territory on that commodity. Also, applicant transported a sufficient number of shipments of frozen berries and vegetables from several Michigan origins to Kansas City to justify a grant of authority here.

Minnesota origins. Beyond those shipments of frozen vegetables which protestant agrees warrant a grant of authority, applicant's operations were entirely sporadic.

Arkansas origins. Protestant concedes that applicant's operations warrant a grant of authority to transport frozen vegetables from Ft. Smith to Detroit, and frozen berries from Ft. Smith to Chicago. We find that it has transported frozen vegetables before and after the critical date

from Ft. Smith to San Francisco and Miami and Jacksonville, Fla., and that it therefore should be granted that additional authority. Four other scattered shipments (from two origins to four destinations in three States) occurred prior to the critical date during 1957 and 1958. Shipments from and to these points were not repeated subsequently. Various other points were served subsequently, but it would be very unrealistic for us to conclude that applicant was conducting operations from and to other points on the statutory date.

Delaware origins. Applicant transported a number of shipments of frozen vegetables from Clayton to Fayetteville and Springdale, Ark., from 1957 through 1960. It also handled other similar shipments from Clayton to Rogers, Ark., and from Milton to Springdale and Fayetteville after the critical date. In view of this we think applicant has shown its right to authority to continue transporting frozen vegetables from points in Delaware to points in Arkansas. Other Delaware originated shipments were only sporadic in nature.

Illinois origins. Applicant handled only a relatively few shipments of frozen fruits, berries, and vegetables from Chicago during this period, but there were enough to support a grant of authority from Chicago to Kansas City as recommended by the examiner. Other Illinois shipments were only sporadic in nature.

Origins in other States. Applicant transported no shipments of the involved commodities during the period January 1, 1957 to May 1, 1958, from points in a number of other States. From points in some of these States a few shipments were transported later, but these operations show no pattern upon which we can fairly or realistically base a grant of grandfather authority. States in this category include Arizona, Colorado, Georgia, Kansas, Louisi-

ana, Tennessee, New Jersey, Maryland, Missouri, New York, and Virginia. Shipments were shown to have originated at points in the last five named States during 1960 only. From points in Oklahoma, Pennsylvania, Texas, and Utah, there were a few shipments before and a few shipments after the statutory date, but not in any related pattern. For example, there were single shipments from Oklahoma City to Burbank, Calif., and Chicago during 1957, but none subsequently. A Tulsa shipment was transported to St. Louis, Mo., during 1958 after May 1. Thereafter, in 1960, applicant transported a number of shipments of frozen berries and vegetables from other Oklahoma origins to various other destinations. None of these operations were such as to justify grandfather authority.

3. **Republication.**

Opposing carriers who were present at the hearing do not appear to have been prejudiced by the incomplete summary of the application published in the Federal Register, but other members of the public who relied upon the notice as published may have an interest which has been prejudiced by the lack of proper notice. We shall, therefore, republish in the Federal Register the authority sought to transport frozen fish at the same time in the same vehicle with frozen fruit, berries, and vegetables as indicated in the findings. Any prejudiced person may file an appropriate pleading within 20 days of such publication.

4. **Findings.**

We find that applicant was, on May 1, 1958, in bona fide operation, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes of

(a) frozen fruit, frozen berries, and frozen vegetables

(1) from points in California, Oregon, and Washington to points in Arkansas, Kansas, Missouri and Oklahoma.

(2) from points in California to points in Iowa, Nebraska and Texas.

(3) from Chicago, Ill. to Kansas City, Mo.

(4) from points in the Lower Peninsula of Michigan to Kansas City, Mo.

(b) frozen fruit

(1) from Omaha, Nebr. to Modesto, Calif.

(2) from points in the Lower Peninsula of Michigan to St. Joseph, Mo., Oklahoma City, Okla., Omaha, Nebr. and points in Kansas.

(c) frozen vegetables

(1) from Omaha, Nebr. to points in Arkansas.

(2) from Ft. Smith, Ark. to Detroit, Mich., Miami and Jacksonville, Fla., and San Francisco, Calif.

(3) from points in Delaware to points in Arkansas.

(4) from points in Minnesota on and south of U. S. Highway 14 to Omaha, Nebr., Kansas City and St. Joseph, Mo., Oklahoma City, Okla., and points in Arkansas and Kansas.

(d) frozen berries from Fort Smith, Ark., to Chicago, Ill.

(e) frozen fish when moving in the same vehicle and at the same time with frozen fruits, frozen vegetables, or frozen berries from Seattle, Wash., and Astoria, Oreg., to points in Arkansas, Kansas, Missouri, and Oklahoma; and from San Francisco, Monterey, San Jose, and Los Angeles, Calif., to points in

Arkansas, Kansas, Missouri, Oklahoma, Iowa, Nebraska and Texas:

and has so operated since that time; that unless otherwise ordered a certificate authorizing the continuance of such operations should be granted after the elapse of 20 days from the date of republication in the Federal Register of a statement of the authority granted herein to transport frozen fish when transported at the same time in the same vehicle with frozen fruit, berries, or vegetables as indicated above; and that the application in all other respects should be denied.

Subject to the above condition with respect to republication, upon compliance by applicant with the requirements of sections 215, 217, and 221 (c) of the act, and with our rules and regulations thereunder within the time specified in the order entered concurrently herein, an appropriate certificate will be issued.

An appropriate order will be entered.

Commissioner Webb, dissenting in part:

Applicant has shown that it was engaged in good faith operations involving the transportation of frozen potato items in mixed loads with frozen fruits, vegetables and berries. In my opinion, the majority should not have refused to consider shipments of frozen fruits, vegetables and berries which moved in vehicles with frozen potato products. But cf. **Panther Oil and Grease Mfg. Co., Inc., Contr. Car. Applic.**, 84 M. C. C. 393.

A. Authority recommended by the examiner:

(a) frozen fruits, frozen berries, and frozen vegetables, (1) from Burley, Caldwell, and Nampa, Idaho, and points in California, Oregon, and Washington, to Denver, Colo., Detroit, Mich., Omaha, Nebr., and points

in Arkansas, Illinois, Iowa, Kansas, Missouri, Oklahoma, and Texas, (2) from Little Rock, Ark., and from points in that part of Arkansas on, north, and west of a line beginning at the Arkansas-Oklahoma State line near Fort Smith, Ark., and extending along Arkansas Highway 22 to Dardanelle, Ark., thence northward along Arkansas Highway 7 to Harrison, Ark., and thence along U. S. Highway 65 to the Arkansas-Missouri State line, to points in Illinois, Michigan, Missouri, and Texas, (3) from points in Minnesota on the south of U. S. Highway 14 to Omaha, Nebr., and points in Arkansas, Kansas, Missouri, and Oklahoma, (4) from points in the lower peninsula of Michigan to Omaha, Nebr., and points in Kansas, Missouri, and Oklahoma, (5) from Kansas City, Kans., Kansas City, Mo., Omaha, Nebr., and Oklahoma City, Okla., to points in California and Oregon, (6) from Omaha to points in Arkansas, and (7) from Chicago, Ill., to Kansas City, Mo., and (b) of frozen fish when moving in the same vehicle with frozen fruits, frozen berries, or frozen vegetables, from Monterey, San Jose, San Francisco, and Los Angeles, Calif., Idaho Falls and Twin Falls, Idaho, Astoria, Oreg., and Seattle, Wash., to points in Arkansas, Illinois, Iowa, Kansas, Missouri, Oklahoma, and Texas, all over irregular routes,

B. Authority protestant concedes should be granted:

(a) frozen fruit, berries, and vegetables

(1) from points in California, Oregon, and Washington to points in Arkansas, Kansas, Missouri, and Oklahoma

(2) from points in California to points in Iowa

(3) from Watsonville, Sanger, Modesto, and Santa Clara, Calif., to Amarillo, Tex.

(b) frozen fruit

(1) from Omaha, Nebr., to Modesto, Calif.

(2) from points in the lower peninsula of Michigan to Kansas City and St. Joseph, Mo., Oklahoma City, Okla., and points in Kansas

(c) frozen vegetables

(1) from Fort Smith, Ark., to Detroit, Mich.

(2) from Omaha, Nebr., to Fayetteville, Rogers, and Springdale, Ark.

(3) from points in Minnesota on and south of U. S. Highway 14 to Omaha, Nebr., Kansas City and St. Joseph, Mo., Oklahoma City, Okla., and points in Arkansas and Kansas

(d) frozen berries from Fort Smith, Ark., to Chicago, Ill.

Order.

At a Session of the Interstate Commerce Commission, Division 1, Held at Its Office in Washington, D. C., on the 27th day of September, A. D. 1961.

No. MC-117119 (Sub-No. 2)

Willis Shaw Frozen Express, Inc., Common Carrier "Grandfather" Application

Investigation of the matters and things involved in this proceeding having been made, and said division, on the date hereof, having made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby made a part hereof:

It is ordered, That said application, except to the extent granted in said report, be, and it is hereby, denied, effective November 13, 1961.

And it is further ordered, That unless compliance is made by applicant with the requirements of Sections 215, 217, and 221 (c) of the Interstate Commerce Act within 90 days after the date of service hereof, or within such additional time as may be authorized by the Commission, the grant of authority made in said report shall be considered as null and void and the application shall stand denied in its entirety effective upon the expiration of the said compliance time.

By the Commission, division 1.

Harold D. McCoy,
Secretary.

(Seal)

Service Date
February 20, 1962

Order

At a Session of the Interstate Commerce Commission, Division 1, Acting as an Appellate Division, Held at Its Office in Washington, D. C., on the 7th Day of February, A. D. 1962.

No. MC-117119 (Sub-No. 2)

Willis Shaw Frozen Express, Inc., Common Carrier
"Grandfather" Application

Upon consideration of the record in the above-entitled proceeding, and of:

(1) Petition of Willis Shaw Frozen Express, Inc., applicant filed December 1, 1961, for reconsideration;

(2) Reply by Pacific Intermountain Express Co., protestant, filed December 26, 1961;

and good cause appearing therefor:

It is ordered, That the said petition be, and it is hereby, denied, for the reason that the findings of Division 1 are in accordance with the evidence and the applicable law;

It is further ordered, That the order of September 27, 1961, as postponed pursuant to section 17 (8) of the Interstate Commerce Act, be, and it is hereby, reinstated and the effective date is fixed as March 30, 1962;

It is further ordered, That, unless compliance is made by applicant with the requirements of Sections 215, 217 and 221 (c) of the Interstate Commerce Act, within 90 days of service of this order, or within such additional time as may be authorized by the Commission, the grant of authority made in the report and order entered herein on September 27, 1961, shall be considered as null and void, and the application shall stand denied in its entirety effective upon expiration of the said compliance time.

By the Commission, Division 1, Acting as an Appellate Division.

Harold D. McCoy,
Secretary.

(Seal)

APPENDIX C.

Interstate Commerce Commission.

Served May 4, 1961.

Notice to the Parties.

Exceptions, if any, must be filed with the Secretary, Interstate Commerce Commission, Washington, D. C., and served on all other parties in interest, within 35 days from the date of service shown above, or within such further period as may be authorized for the filing of exceptions. At the expiration of the period for filing of exceptions, the attached order will become the order of the Commission and will become effective unless exceptions are filed seasonably or the order is stayed or postponed by the Commission. To be seasonably filed, exceptions must reach the Commission on or before the date they are due. If exceptions are filed, replies thereto may be filed within 25 days after the final date for filing exceptions. The stated specific time periods apply to all parties and give full effect to Rule 1.21 (c) of the General Rules of practice to the extent, if any, the provision of such rule otherwise would be applicable to this proceeding.

The certificate or permit will not be issued until the applicant has complied with the provisions of the Interstate Commerce Act and the requirements of the Commission thereunder. It should not be assumed that the recommended order has become effective as the order of the Commission until a notice to that effect, signed by the Secretary of the Commission, has been received.

No. MC-117119 (Sub-No. 2).

Willis Shaw Frozen Express, Inc., Common Carrier "Grandfather" Application.

Decided .....

Applicant found entitled to a certificate under the "grandfather" provision of Section 7 (c) of the Transportation Act of 1958 authorizing operation as a motor common carrier of specified commodities from and to points in a number of States. Issuance of a certificate recommended upon compliance by applicant with certain conditions, and application denied in certain respects.

A. Alvis Layne, Jr., and John H. Joyce for applicant.

Charles L. Ford, Jr., Earl J. Brooks, and Hugh T. Matthews for protestants.

Report and Order.

Recommended by William J. Cave, Hearing Examiner.

By application filed December 5, 1958, Willis Shaw Frozen Express, Inc., of Elm Springs, Ark., seeks[1] a certificate under the "grandfather" proviso of Section 7 (c) of the Transportation Act of 1958, authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle, of frozen fruits, frozen berries, frozen vegetables, frozen poultry, frozen poultry parts, frozen fish and other frozen seafood, including seafood pies, meals, and dinners, from and to points in Alabama, Ari-

[1] The notice of the application as published in the Federal Register on February 4, 1959, did not reveal that applicant is seeking authority to transport frozen poultry, frozen poultry parts, frozen fish and other frozen seafood, including seafood pies, meals, and dinners.

zona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, New York, Oklahoma, Oregon, Ohio, Pennsylvania, Tennessee, Texas, Utah, Virginia, Washington and Wisconsin, over irregular routes.

The application was referred to the examiner for hearing and the recommendation of an appropriate order thereon accompanied by the reasons therefor. Hearing was held as scheduled on October 24, 1960, at Dallas, Tex. Class I Rail Carriers in the Western District, The Texas Railroad Association, and a number of motor carriers and railroads oppose the application.

Applicant is an Arkansas corporation and has been operating as a motor common carrier of property for several years. It is successor in interest to a motor carrier business initially instituted by Willis D. Shaw in 1938 and later performed by Willis D. Shaw and Ellis Bogen, a partnership, doing business as Willis Shaw Produce Co. Prior to 1948 the motor carrier business of Willis Shaw was restricted to the transportation of fresh fruits and vegetables and live poultry. Beginning in 1948 the partnership transported frozen fruits, frozen berries, frozen vegetables, frozen poultry, and frozen fish in addition to the other commodities named above. A certificate No. MC-117119, issued to applicant's predecessor on June 2, 1958, authorizing the transportation of frozen poultry and frozen foods from points in a territory in Arkansas to points in Arizona, California, Colorado, Idaho, Nevada, New Mexico, Oregon, and Washington was reissued to the applicant herein on February 4, 1959 subsequent to the approval, in No. MC-FC-61586-A, of the substitution of applicant as the purchaser of the operating rights of the partnership.

Applicant's president testified in support of the application and, in addition, he submitted abstracts of applicant's records of transportation performed on, prior, and subsequent to May 1, 1958. The abstracts referred to cover shipments transported from May 3, 1954 through October 20, 1960, and they show service from and to points in many States most of which are west of the Mississippi River. Prior to October 1957, applicant's predecessors transported some shipments as a private carrier. One of the protestants contends that the evidence reveals that 24.77 percent of all shipments transported by applicant's predecessors between May 3, 1954, and September 30, 1957, moved in private carriage, whereas applicant submits that the underlying documents in support of the abstracts of its records shows that only 8.4 percent moved in private carriage. However, the disagreement in respect of the extent of the private carriage is relatively unimportant because (a) the parties agree that no private carriage is shown to have been performed subsequent to September 30, 1957, and (b) a determination of applicant's grandfather operating rights can be made largely on the basis of operations shown to have been conducted continuously since October 1, 1957.

Although applicant is seeking authority to operate between points in 35 States in the performance of a nonradial cross-haul service, the documentary evidence of service rendered both prior and subsequent to May 1, 1958 reveals that applicant's operations as well as those of its predecessors have been radial in character and generally have extended (1) from base areas or points in California, Idaho, Oregon, and Washington to a territory within or immediately adjacent to Nebraska, Iowa, Illinois, Kansas, Missouri, Oklahoma, Arkansas, and Texas, (2) from points in a base area in Arkansas to points in California, Oregon, Illinois, Michigan, Missouri, and

Texas, (3) from points in a base area in Minnesota on and south of U. S. Highway 14 to Omaha, Nebr., and to points in an area embracing the States of Arkansas, Kansas, Missouri, and Oklahoma, (4) from points in the Lower Peninsula of Michigan to Omaha, Nebr., and points in a territory embracing Kansas, Missouri, and Oklahoma, (5) from Kansas City, Kans., Kansas City, Mo., Omaha, Nebr., and Oklahoma City, Okla., to points in California and Oregon, (6) from Omaha to points in Arkansas, and (7) from Chicago, Ill., to Kansas City, Mo.

The following named points are the principal points representative of the territories served by applicant and its predecessors. The West Coast points are: Modesto, Santa Maria, Sanger, Watsonville, Patterson, Santa Clara, San Jose, Santa Cruz, Salinas, Santa Barbara, Los Angeles, Oxnard, San Francisco, Sunnyvale, Fresno, Yuba City, Sacramento, Soquel, Manteca, Oakland, Paramount, Atascadero, Stockton, Hollister, Mt. View, San Martin, Turlock, Castroville, and Monterey, Calif.; Ontario, Albany, Salem, Hillsboro, Portland, Weston, Milton-Freewater, Sherwood, Woodburn, Tigard, Pendleton, Gresham, Astoria, Stayton, and West Salem, Oreg.; Snohomish, Arlington, Tacoma, Puyallup, Prosser, Yakima, Monroe, Sumner, Ridgefield, Vancouver, Burlington, Kent, Zillah, Seattle, Auburn, Wenatchee, Everett, Mt. Vernon, Stanwood, Olympia, Bellingham, Chehalis, Walla Walla, Ferndale, Frylands, and Grandview, Wash.; and Caldwell, Nampa, Burley, Idaho Falls, Twin Falls, and Boise, Idaho. The principal points in Michigan and Minnesota are: Frankfort, Traverse City, Lawrence, Hart, Ludington, Paw Paw, Detroit, North Port, Benton Harbor, Beulah, Eau Claire, Muskegon, Decatur, and St. Joseph, Mich.; and Fairmont, Waseca, Winnebago, Hopkins, and St. James, Minn. Points in Midwest territory are: Oklahoma City, Tulsa, Stillwell, and Muskogee, Okla.; Kansas City,

Carthage, St. Joseph, St. Louis, Springfield, and Mexico, Mo.; Hutchinson, Topeka, Kansas City, Salina, Wichita, Pittsburg, Meade, and Smith Center, Kans.; Omaha, Hastings, Lincoln, Fairbury, Grand Island, and York, Nebr.; Davenport, Burlington, Des Moines, Sioux City, Cherokee, Boone, Chariton, Cedar Rapids, Waterloo, and Laurens, Iowa; Chicago, Waukegan, Wheaton, Milan, Decatur, Springfield, Illiopolis, Galesburg, Peoria, East Peoria, Macomb, and Havana, Ill.; Ft. Smith, Springdale, Little Rock, Van Buren, Search, Fayetteville, Rogers, and Clarksville, Ark.; and Dallas, Fort Worth, Houston, San Antonio, Amarillo, Lubbock, Commerce, Waco, and El Paso, Tex.

Several of the States covered by the application, including Louisiana, Indiana, and Tennessee were served by applicant or its predecessor with some consistency subsequent to 1958, but prior to 1959 there was no service to or from points in those States or the service rendered was so infrequent and sporadic as not to warrant a finding of bona fide operations from or to points in such States. As hereinbefore indicated, applicant and its predecessors have been transporting certain so-called "exempt" commodities and applicant is seeking authority to continue transporting such commodities when moving in the same vehicle with frozen fruits, frozen berries, or frozen vegetables. However, the only so-called exempt commodity shown to have been transported at the same time and in the same vehicle with frozen fruits, berries, and vegetables is frozen fish, which moved from certain points in California, Oregon, Washington, and Idaho, to points in Arkansas, Illinois, Iowa, Kansas, Missouri, Oklahoma, and Texas.

An applicant for authority under Section 7 (c) of the Transportation Act of 1958 has the burden of establishing that it was in *bona fide* operation on May 1, 1958 in the

transportation of the commodities from and to the points covered by its application, and that it has so operated since that time except as to interruptions in service over which it had no control. The term *bona fide* operation as used in the statute has been construed by the Interstate Commerce Commission and the Supreme Court to mean actual rather than potential or simulated service and an operation wherein there has been some consistency in the performance of a service as distinguished from an incidental, sporadic, or infrequent service. It would be difficult, if not impossible, to make and adhere to an inflexible rule as to the showing required to establish a bona fide operation within the meaning of the statute. For instance, there arises, as in the instant case, the question whether an applicant seeking authority under the "grandfather" proviso of the act should be granted authority to serve all points within the origin and destination areas shown to have been served or to serve only the specific points at which service has been rendered. In resolving this issue consideration must be given to the nature or characteristics of the service being performed, to the commodity or commodities transported, to the territorial pattern of distribution of the commodities, and to the shifting, if any, of the origin and destination points served.

In support of its claimed right of authority to serve both origins and destinations on a State-wide basis, the applicant herein presented evidence of the fact that points served in the transportation of frozen fruits, berries, and vegetables may shift from one point or area to another because shippers establish new processing plants and utilize different cold storage plants. While not specifically so stated of record it would appear that adverse elements affecting production in one or more normal producing areas would have a considerable bearing on the ability of a carrier to continue to provide a needed service if the

carrier did not hold the flexible territorial authority necessary under such circumstances.

Considering the class of commodities transported, the class of shippers served; and the character of service which applicant has rendered, the examiner is of the opinion that applicant should be granted flexible Statewide authority to the extent described in the findings herein. Compare **Fleming Common Carrier Application**, 8 M. C. C. 469.

In view of the fact that applicant holds a certificate authorizing the transportation of frozen foods from Little Rock, Ark., and points in that part of Arkansas on, north, and west of a line beginning at the Arkansas-Oklahoma State line near Fort Smith and extending along Arkansas Highway 22 to Dardanelle, Ark., thence northward along Arkansas Highway 7 to Harrison, Ark., and thence along U. S. Highway 65 to the Arkansas-Missouri State line, to points in Arizona, California, Colorado, Idaho, Nevada, New Mexico, Oregon, and Washington, there will be no recommendation that applicant be granted duplicating authority from and to those points.

The only remaining matter requiring discussion is the question in respect of the propriety of findings that an applicant seeking authority under Section 7 (c) of the Transportation Act of 1958 may be granted authority to transport certain so-called exempt commodities in the same vehicle with frozen vegetables, fruits, and berries. As hereinbefore indicated, applicant has been transporting frozen fish in the same vehicle with the other commodities named and it desires to continue to so operate. This question was a matter at issue in **Lewis Common Carrier Application**, 82 M. C. C. 755, wherein the Commission, Division 1, found that in a case where an applicant under the "grandfather" proviso of Section 7 (c) has been

transporting frozen fish or other so-called "exempt commodities" in the same vehicle and at the same time with frozen fruits, frozen berries, and frozen vegetables, and had made appropriate application for authority to continue to so operate, it is consistent with the applicable provisions of the Act to grant the requested authority provided the applicant has established that it was in bona fide operation in performance of the service on and continuously since May 1, 1958, citing **Fish Transport Co., Inc., Common Carrier Application,** 27 M. C. C. 689, and **Berr Contract Carrier Application,** 43 M. C. C. 437. A petition for reconsideration of this finding of Division 1 was denied by the entire Commission order dated September 22, 1960, on the ground that the findings of Division 1 were in accordance with the evidence and applicable law. In view of this action by the Commission, the Examiner shall recommend that the applicant herein be granted authority to transport frozen fish when moving in the same vehicle with frozen vegetables, frozen fruits, and frozen berries, from and to the points specified in the findings herein.

The examiner is of the opinion that authority to transport frozen fish as herein recommended should be granted notwithstanding the fact that the notice of the scope of the application as published in the Federal Register did not reveal the full scope of the application. The conclusion in this respect is based on the facts (1) that frozen fish is a commodity that applicant or any other carrier may transport without authority provided the fish does not move in the same vehicle with commodities subject to the certificate requirements of the Act, (2) that protestants will not be prejudiced by continuance of a service which applicant and its predecessors lawfully have performed in competition with protestants over a long period of years, and (3) that republication of the application in

the Federal Register for correcting an inadvertent error would not in this particular case serve any purpose other than to delay the ultimate disposition of an application proceeding which has been pending for more than two years.

Findings.

The examiner finds that on May 1, 1958, applicant was in bona fide operation, in interstate or foreign commerce, as a common carrier by motor vehicle, (a) of frozen fruits, frozen berries, and frozen vegetables, (1) from Burley, Caldwell, and Nampa, Idaho, and points in California, Oregon, and Washington, to Denver, Colo., Detroit, Mich., Omaha, Nebr., and points in Arkansas, Illinois, Iowa, Kansas, Missouri, Oklahoma, and Texas, (2) from Little Rock, Ark., and from points in that part of Arkansas on, north, and west of a line beginning at the Arkansas-Oklahoma State line near Fort Smith, Ark., and extending along Arkansas Highway 22 to Dardanelle, Ark., thence northward along Arkansas Highway 7 to Harrison, Ark., and thence along U. S. Highway 65 to the Arkansas-Missouri State line, to points in Illinois, Michigan, Missouri, and Texas, (3) from points in Minnesota on and south of U. S. Highway 14 to Omaha, Nebr., and points in Arkansas, Kansas, Missouri, and Oklahoma, (4) from points in the Lower Peninsula of Michigan to Omaha, Nebr., and points in Kansas, Missouri, and Oklahoma, (5) from Kansas City, Kans., Kansas City, Mo., Omaha, Nebr., and Oklahoma City, Okla., to points in California and Oregon, (6) from Omaha to points in Arkansas, and (7) from Chicago, Ill., to Kansas City, Mo., and (b) of frozen fish when moving in the same vehicle with frozen fruits, frozen berries, or frozen vegetables, from Monterey, San Jose, San Francisco, and Los Angeles, Calif., Idaho Falls and Twin Falls, Idaho, Astoria, Oreg., and Seattle, Wash., to points in Arkansas, Illinois, Iowa, Kansas, Missouri, Oklahoma, and

Texas, all over irregular routes, and has so operated since that time; that applicant is entitled to a certificate authorizing continuance of the described operation; and that the application in all other respects should be denied.

It is recommended that the appended order be entered.

By William J. Cave, Hearing Examiner.

(Signature) William J. Cave.

Recommended by William J. Cave,
Hearing Examiner

(Signature) William J. Cave.

Order.

At a Session of the Interstate Commerce Commission, Division 1, held at its office in Washington, D. C., on the .... day of ..... A. D. 1961

No. MC-117119 (Sub-No. 2)

Willis Shaw Frozen Express, Inc., Common Carrier
"Grandfather" Application

Investigation of the matters and things involved in this proceeding having been made, said application upon due notice having been heard by the Examiner, who has made and filed a report herein containing his findings of fact and conclusions thereon, which report is hereby made a part hereof, and said proceeding having been duly submitted:

It is ordered, That upon compliance with the requirements of sections 215, 217, and 221 (c) of the Interstate Commerce Act, and with our rules and regulations thereunder, a certificate be issued to applicant authorizing operations, in interstate or foreign commerce, as a common carrier by motor vehicle of the commodities described,

and in the manner described in the findings in the said report.

It is further ordered, That the application in all other respects be, and it is hereby, denied.

It is further ordered, That unless compliance is made by applicant with the requirements of sections 215, 217, and 221 (c) of the act within 90 days after the date of service of a notice to the parties that this order has become effective as the order of the Commission, or within such additional time as may be authorized by the Commission, the grant of authority made in said report shall be considered as null and void and the application shall stand denied in its entirety effective upon the expiration of the said compliance time.

And it is further ordered, That this order shall be effective on

By the Commission, division 1.

Harold D. McCoy,
Secretary.

(Seal)

APPENDIX D.

Comparative Statement of Operating Authority Recommended by Hearing Examiner and That Granted by the Commission in MC-117119 (Sub. No. 2) (R. 714-718).

Authority to Which Plaintiff Found Entitled in Examiner's Report	Authority Granted Plaintiff by Commission
1. Frozen Fruits, Frozen Berries and Frozen Vegetables From points in California To Denver, Colorado, Detroit, Michigan, Omaha, Nebraska, and points in Arkansas, Illinois, Iowa, Kansas, Missouri, Oklahoma and Texas	1. Frozen Fruit, Frozen Berries and Frozen Vegetables From points in California To points in Arkansas, Iowa, Kansas, Missouri, Nebraska, Oklahoma, and Texas The Commission did not grant: From points in California To Denver, Colorado, Detroit, Michigan, or points in Illinois
2. Frozen Fruits, Frozen Berries and Frozen Vegetables From points in Oregon and Washington To Denver, Colorado, Detroit, Michigan, Omaha, Nebraska, and points in	2. Frozen Fruit, Frozen Berries and Frozen Vegetables From points in Oregon and Washington To points in Arkansas, Kansas, Missouri, and Oklahoma

Authority to Which Plaintiff Found Entitled in Examiner's Report	Authority Granted Plaintiff by Commission
Arkansas, Illinois, Iowa, Kansas, Missouri, Oklahoma and Texas	The Commission did not grant: From points in Oregon and Washington To Denver, Colorado, Detroit, Michigan, Omaha, Nebraska, or to points in Illinois, Iowa, and Texas
3. Frozen Fruits, Frozen Berries and Frozen Vegetables From Burley, Caldwell and Nampa, Idaho To Denver, Colorado, Detroit, Michigan, Omaha, Nebraska, and points in Arkansas, Illinois, Iowa, Kansas, Missouri, Oklahoma, and Texas	3. The Commission did not grant any authority from Idaho
4. Frozen Fruits, Frozen Berries and Frozen Vegetables From Little Rock, Arkansas, and points in that part of Arkansas on, north and west of a line	4. Frozen Vegetables From Fort Smith, Arkansas To Detroit, Michigan, Miami and Jacksonville,

Authority to Which Plaintiff Found Entitled in Examiner's Report	Authority Granted Plaintiff by Commission
beginning at the Arkansas-Oklahoma State line near Fort Smith, Arkansas, and extending along Arkansas Highway 22 to Dardanelle, Arkansas, thence northward along Arkansas Highway 7 to Harrison, Arkansas, and thence along U. S. Highway 65 to the Arkansas-Missouri State line	Florida, and San Francisco, California
To points in Illinois, Michigan, Missouri, and Texas	Frozen Berries From Fort Smith, Arkansas To Chicago, Illinois The Commission did not grant: (a) any point of origin in Arkansas other than Fort Smith, and that limited to either frozen berries or frozen vegetables; (b) any point of destination in Illinois other than Chicago, and that limited to frozen berries; (c) any point of destination in Michigan other than Detroit, and that limited to frozen vegetables; (d) any point of destination in Missouri or Texas
5. Frozen Fruits, Frozen Berries and Frozen Vegetables From points in Minnesota on and south of U. S. Highway 14	5. Frozen Vegetables From points in Minnesota on and south of U. S. Highway 14

Authority to Which Plaintiff Found Entitled in Examiner's Report	Authority Granted Plaintiff by Commission
To Omaha, Nebraska, and points in Arkansas, Kansas, Missouri, and Oklahoma	To Omaha, Nebraska, Kansas City and St. Joseph, Missouri, Oklahoma City, Oklahoma, and points in Arkansas and Kansas The Commission did not grant: (a) Frozen berries or frozen fruits; (b) any point in Missouri as destination, other than Kansas City and St. Joseph; (c) any point in Oklahoma as destination, other than Oklahoma City.
6. Frozen Fruits, Frozen Berries and Frozen Vegetables From points in the Lower Peninsula of Michigan To Omaha, Nebraska, and points in Kansas, Missouri, and Oklahoma	6. Frozen Fruit From points in the Lower Peninsula of Michigan To Omaha, Nebraska, St. Joseph, Missouri, Oklahoma City, Oklahoma, and points in Kansas Frozen Fruit, Frozen Berries and Frozen Vegetables From points in the Lower Peninsula of Michigan To Kansas City, Missouri

Authority to Which Plaintiff Found Entitled in Examiner's Report	Authority Granted Plaintiff by Commission
	The Commission did not grant: (a) Frozen berries or frozen vegetables other than to Kansas City, Missouri; (b) any point in Missouri as destination, other than St. Joseph and Kansas City; (c) any point in Oklahoma as destination, other than Oklahoma City.
7. Frozen Fruits, Frozen Berries and Frozen Vegetables	7. Frozen Fruit
From Kansas City, Kansas, Kansas City, Missouri, Omaha, Nebraska, and Oklahoma City, Oklahoma	From Omaha, Nebraska
To points in California and Oregon	To Modesto, California
	The Commission did not grant: (a) Frozen berries or frozen vegetables; (b) Kansas City, Kansas, Kansas City, Missouri, or Oklahoma City,

Authority to Which Plaintiff Found Entitled in Examiner's Report	Authority Granted Plaintiff by Commission
	Oklahoma, as points of origin; (c) any point of destination in California other than Modesto; (d) any point of destination in Oregon.
8. Frozen Fruits, Frozen Berries and Frozen Vegetables From Omaha, Nebraska To points in Arkansas	8. Frozen Vegetables From Omaha, Nebraska To points in Arkansas The Commission did not grant: Frozen fruits or frozen berries
9. Frozen Fruits, Frozen Berries and Frozen Vegetables From Chicago, Illinois To Kansas City, Missouri	9. Frozen Fruit, Frozen Berries and Frozen Vegetables From Chicago, Illinois To Kansas City, Missouri
10. Frozen Fish when moving in the same vehicle with frozen fruits, frozen vegetables From Monterey, San Jose, San Francisco, and Los Los Angeles, Califor-	10. Frozen Fish when moving in the same vehicle and at the same time with frozen fruits, frozen vegetables or frozen berries From Seattle, Washington, and Astoria, Oregon

Authority to Which Plaintiff Found Entitled in Examiner's Report	Authority Granted Plaintiff by Commission
nia, Idaho Falls and Twin Falls, Idaho, Astoria, Oregon, and Seattle, Washington	
To points in Arkansas, Illinois, Iowa, Kansas, Missouri, Oklahoma, and Texas	To points in Arkansas, Kansas, Missouri, and Oklahoma, and From San Francisco, Monterey, San Jose, and Los Angeles, California To points in Arkansas, Kansas, Missouri, Oklahoma, Iowa, Nebraska, and Texas.
	The Commission did not grant: (a) Idaho Falls and Twin Falls, Idaho, as points of origin; (b) any point in Illinois as destination; (c) any point in Texas or Iowa as destination from Seattle and Astoria
11. The Examiner did not recommend the following authority granted by the Commission:	

Authority to Which Plaintiff Found Entitled in Examiner's Report	Authority Granted Plaintiff by Commission
(a) Frozen fruits, frozen berries, and frozen vegetables	
From points in California	
To points in Nebraska other than Omaha;	
(b) Frozen vegetables	
From Fort Smith, Arkansas	
To Miami and Jacksonville, Florida, and San Francisco, California;	
(c) Frozen vegetables	
From points in Delaware	
To points in Arkansas	

APPENDIX E.

Statutes Involved.

Motor Carrier Act

Section 203 (b) (6), 49 U. S. C., § 303 (b) (6)*

(b) Nothing in this chapter, except the provisions of section 304 of this title relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include . . . (6) motor vehicles used in carrying property consisting of ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof), if such motor vehicles are not used in carrying any other property, or passengers, for compensation: **Provided, That the words "property consisting of ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof)" as used herein shall include property shown as "Exempt" in the "Commodity List" incorporated in ruling numbered 107, March 19, 1958, Bureau of Motor Carriers, Interstate Commerce Commission, but shall not include property shown therein as "Not exempt": Provided further, however, That notwithstanding the preceding proviso the words "property consisting of ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof)" shall not be deemed to include frozen fruits, frozen berries, frozen vegetables, cocoa beans, coffee beans, tea, bananas, or hemp, and wool imported from any foreign country, wool**

* Emphasized portions are the amendments to this Section effected by Section 7 (a) of the Transportation Act of 1958, 72 Stat. 573.

tops and noils, or wool waste (carded, spun, woven, or knitted), and shall be deemed to include cooked or uncooked (including breaded) fish or shell fish when frozen or fresh (but not including fish and shell fish which have been treated for preserving, such as canned, smoked, pickled, spiced, corned or kippered products) . . .

Transportation Act of 1958

Section 7 (a), 72 Stat. 573—[See Section 203 (b) (6) of the Motor Carrier Act, *supra*]

Section 7 (c), 72 Stat. 574

Subject to the provisions of section 210 of the Interstate Commerce Act [49 U. S. C., § 310], if any person (or its predecessor in interest) was in bona fide operation on May 1, 1958, over any route or routes or within any territory, in the transportation of property for compensation by motor vehicle made subject to the provisions of part II of that Act by paragraph (a) [§ 203 (b) (6) amendment] of this section, in interstate or foreign commerce, and has so operated since that time (or if engaged in furnishing seasonal service only, was in bona fide operation on May 1, 1958, during the season ordinarily covered by its operations and has so operated since that time), except in either instance as to interruptions of service over which such applicant or its predecessor in interest had no control, the Interstate Commerce Commission shall without further proceedings issue a certificate or permit, as the type of operation may warrant, authorizing such operations as a common or contract carrier by motor vehicle if application is made to the said Commission as provided in part II of the Interstate Commerce Act and within one hundred and twenty days after the date on which this section takes effect [August 12, 1958]. Pending the determination of any such application, the continuance of such operation without a

certificate or permit shall be lawful. Any carrier which on the date this section takes effect is engaged in an operation of the character specified in the foregoing provisions of this paragraph, but was not engaged in such operation on May 1, 1958, may under such regulations as the Interstate Commerce Commission shall prescribe, if application for a certificate or permit is made to the said Commission within one hundred and twenty days after the date on which this section takes effect, continue such operation without a certificate or permit pending the determination of such application in accordance with the provisions of part II of the Interstate Commerce Act.